IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

FRIDAY, THE 15TH DECEMBER 2006 / 24TH AGRAHAYANA 1928

FAO.No. 87 of 2004()

AS.167/1997 of I ADDL. DISTRICT COURT, PALAKKAD
OS.58/1993 SUBORDINATE JUDGE'S COURT, OTTAPPALAM

APPELLANT/RESPONDENT/PLAINTIFF

MADHAVAN S/O. NILATHUMARE MANAPPULLY,
RESIDING AT CHERUKULATH, THENKARA AMSOM AND
DESOM, MANNARKKAD TALUK, PALAKKAD DISTRICT

BY ADV. SRI.T.SETHUMADHAVAN
SRI.PUSHPARAJAN KODOTH
SRI.K.JAYESH MOHANKUMAR

RESPONDENT: APPELLANT/DEFENDANT

THANKAM D/O. AMBALATH AMBALA MOOTHAN,
RESIDING AT ARAKKURISSI AMSOM, MANNARKKAD TALUK,
PALAKKAD DISTRICT.

BY ADV.SRI.V.CHITAMBARESH
SRI.T.C.SURESH MENON

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 15/12/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

I.A.NO.935/2004 IN FAO.NO.87/2004

DISMISSED

15/12/2006 SD/- K.T.SANKARAN, JUDGE

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K.T. SANKARAN, J.

F.A.O.NO. 87 OF 2004

Dated this the 15th day of December,2006

JUDGMENT

The appellant/plaintiff and the respondent/ defendant entered into Ext.A1 agreement dated 23.2.1990 for sale of the plaint schedule property having an extent of 53 cents of `nilam'. The price fixed was Rs.315/- per cent of land. The plaintiff - buyer paid an advance of Rs.10,000/- on the date of agreement. The period fixed in the agreement for completion of the transaction was 11.2.1991. According to the plaintiff, possession was given to him on the date of agreement. The plaintiff alleged that on 11.2.1991, a sum of Rs.6,601/- was paid to the defendant and the time for completion of the transaction was extended till 30th Makaram 1168 (M.E.) which corresponds to 12.12.1993. Ext.A2 notice was issued by the plaintiff on 3.2.1993 demanding execution of the

assignment deed to which Ext.A3 reply was sent by the defendant stating that she was prepared to execute the assignment deed, provided, the plaintiff paid the loan amounts due to the banks charged on the property. Evidently, the plaintiff was not willing for the same. The suit was filed for specific performance.

2. The defendant contended in the written statement that the plaint schedule property is the only agricultural land belonging to her and that herself and five other family members are depending for their livelihood on the income derived from this property. She denied the contention that Rs.6,601/- was received on 11.2.1991 and an endorsement was made on Ext.A1 to that effect. Handing over of possession of the property was also denied. It was contended that the value of the property at the time of Ext.A1 agreement was Rs.1,000/- per cent. According to the defendant,

she borrowed a sum of Rs.10,000/- from the plaintiff for the purpose of the wedding of her daughter. The plaintiff insisted for writing an agreement and he also insisted that the loans due to the banks should not be mentioned in the agreement. The agreement was prepared by the plaintiff. The defendant had not read and understood the contents of the agreement. She believed the plaintiff and signed the agreement. The plaintiff failed to discharge the debts due to the banks. The extent of the property is not 53 cents but much more than that. Since the plaintiff failed to discharge the debts due to the banks, revenue recovery proceedings were initiated and the defendant was compelled to pay the instalments payable to the banks. The plaintiff is a money lender and he owns large extent of properties. He does not require the plaint schedule property. The defendant also expressed her readiness to repay Rs.10,000/- with interest. It was contended that

the plaintiff is not entitled to the discretionary relief of specific performance.

3. The trial court decreed the suit. It was held that Ext.A1 agreement was executed by the defendant knowing well the contents of the same. The endorsement on 11.2.1991 was made by the defendant and she put her signature. Rs.6,601/- was received by the defendant. The trial court did not accept the case of the defendant that there was an oral agreement on the date of Ext.A1 itself, on the ground that such an oral agreement would be hit by Section 92 of the Evidence Act since the terms of the oral agreement are inconsistent with the terms of Ext.A1. It was held by the trial court that the fact that the plaint schedule property is the only agricultural property belonging to the defendant and that there was price escalation due to lapse of time are not relevant considerations. The defendant is a nursing

assistant employed in a government hospital. The trial court noticed that the evidence of PW1 that he got possession of the property was not challenged in cross examination and that the defendant while examined as DW1 did not state that possession was not handed over to the plaintiff. It was held that the plaintiff is in possession of the plaint schedule property. On the ground that the defendant has raised a false contention in respect of the receipt of Rs.6,601/- and the endorsement made on Ext.A1 on 11.2.1991, the trial court concluded that she is not entitled to invoke the discretion under the Specific Relief Act.

4. On appeal by the defendant, the Appellate Court reversed the finding of the trial court and held that the plaintiff is not entitled to get specific performance of Ext.A1 agreement. However, the suit was remanded to the trial court to enable the plaintiff to amend the plaint for realisation

of the advance amount paid by him and the amounts paid by the plaintiff during pendency of the suit as evidenced by Exts.A4 and A5 receipts. As per Exts.A4 and A5, the plaintiff paid a sum of Rs.5,900/- and Rs.6,110/- respectively to the Perinthalmanna Co-operative Agricultural and Rural Development Bank. Evidently, those payments were made by the plaintiff to avert sale of the plaint schedule property in realisation of the debt due to the bank. The Appellate Court held that the total extent of the property covered by Ext.A1 agreement is 53 cents and it was valued at Rs.315/- per cent and thus the total value of the property would be Rs.16,695/-. Out of this sale consideration, Rs.10,000/- was paid on the date of agreement itself, ie., on 23.2.1990, Rs.6,601/- was paid on 11.2.1991 and the balance payable was only Rs.94/-. On 11.2.1991, at the time when Rs.6,601/- was paid to the defendant, time for execution of the agreement was extended till 12.2.1993. This is a

circumstance, according to the court below, which indicates that the transaction between the plaintiff and the defendant was a loan transaction and not one for sale of the plaint schedule property. The fact that in respect of the agreement dated 23.2.1990, a notice for the first time was issued only on 3.2.1993 was also taken note of by the court below. The plaintiff stated in evidence that the property was measured and the extent was found to be 52.5 cents. If that be so, the amount of Rs.16,601/- paid by him would be in excess of the sale consideration under Ext.A1. The court below concluded that in spite of the fact that more than 99% of the sale consideration was paid, the transaction was not completed and the period for the same was extended for more than two years without any reason whatsoever. It was noticed that no explanation is offered by the plaintiff either in the pleadings or in the evidence explaining this unusual circumstance.

5. The learned counsel for the appellant submitted that the court below was not justified in upsetting the well considered judgment of the trial court and that the discretion under Section 20 was improperly exercised in favour of the defendant. Though no substantial question of law was raised in the Memorandum of Appeal, the learned counsel submitted that the question of law arising for consideration in this appeal is whether the court below has exercised the discretion properly under Section 20 of the Specific Relief Act on the admitted and proved facts of the case. The learned counsel for the respondent, on the other hand, contended that the Appellate Court has considered all the relevant aspects of the case and exercised the discretion in favour of the defendant and no substantial question of law is involved in the Appeal warranting interference. He relied on the decisions in **Tejram** v. **Patirambhau** ((1997) 9 SCC

634), **Bhaskaran Nair** v. **Habeeb Mohammed** (2002 (1) KLT 864), **Nirmala Anand** v. **Advent Corporation (P) Ltd.** ((2002) 8 SCC 146) and **Narayanan** v. **Kumaran** ((2004) 4 SCC 26).

6. In considering the rival contentions of the parties, the following facts are relevant: (1) The plaint schedule property is the only agricultural land belonging to the defendant. (2) More than 90% of the sale consideration was paid to the defendant in two instalments on 23.2.1990 and 11.2.1991. But Ext.A2 notice was issued only on 3.2.1993. (3) The case of the defendant is that the plaintiff is a money lender and that statement of the defendant in evidence is not subjected to cross examination by the plaintiff, though he denied the same in his chief examination as PW1. (4) The defendant stated in evidence that the plaintiff owns more than ten acres of land and also has inherited three acres as family property. (5) Value of the

property as per the agreement is only Rs.315/- per cent of land. (6) Debts were due to the Co-operative Bank as well as the Canara Bank charged on the plaint schedule property at the time of entering into Ext.A1 agreement. (7) The defendant expressed her readiness in Ext.A3 reply notice to execute the sale deed on condition that the plaintiff shall discharge the debts due to the banks. But the plaintiff did not express his readiness either by sending a reply to Ext.A3 or by stating so in the plaint or in evidence. (8) There was dispute regarding the actual extent of the property and there is dispute as to whether the property was measured or not. (9) Though the plaintiff says that the land in question is a single crop land the unchallenged evidence of DW1 would indicate that the land is a fertile land where three crops could be raised after the irrigation project was established. (10) The plaintiff and the defendant are neighbours and they

knew each other well.

7. In **(1997) 9 SCC 634** (supra), the Supreme Court held, while considering an appeal arising out of a suit for specific performance, thus:

> "... It is unlikely that being a moneylender and having parted with Rs.48,000 as cash, he would have kept quiet either for seeking possession of the property or payment of Rs.2000 immediately and then sought specific performance; it would be unlikely in the normal circumstances that he would have waited for 3 years for issuing notice and then filing suit on the last date. Under these circumstances, the court below rightly came to the conclusion that it is not an agreement for sale or purports to be a sale in truth and in reality, ..."

In **Bhaskaran Nair** v. **Habeeb Mohammed** (2002 (1) KLT 864), a Division Bench of this Court, relying on the decision of the Supreme Court in **A.C.Arulappan** v. **Smt.Ahalya Naik** (AIR 2001 SC 2783), held thus:

> "The delay in filing the suit, non-enquiry regarding the property that was to be sold and the non-inspection of the same are all

matters which go on a long run to show that the plaintiff is not entitled to specific performance."

8. In **Nirmala Anand** v. **Advent Corporation (P) Ltd.** ((2002) 8 SCC 146), the Supreme Court has laid down the manner in which the equities are to be balanced and held as follows:

> "6. It is true that grant of decree of specific performance lies in the discretion of the court and it is also well settled that it is not always necessary to grant specific performance simply for the reason that it is legal to do so. It is further well settled that the court in its discretion can impose any reasonable condition including payment of an additional amount by one party to the other while granting or refusing decree of specific performance. Whether the purchaser shall be directed to pay an additional amount to the seller or converse would depend upon the facts and circumstances of a case. Ordinarily, the plaintiff is not to be denied the relief of specific performance only on account of the phenomenal increase of price during the pendency of litigation. That may be, in a given case, one of the considerations besides many others to be taken into consideration for refusing the decree of specific performance. As a general rule, it cannot be held that ordinarily the

> plaintiff cannot be allowed to have, for her alone, the entire benefit of phenomenal increase of the value of the property during the pendency of the litigation. While balancing the equities, one of the considerations to be kept in view is as to who is the defaulting party. It is also to be borne in mind whether a party is trying to take undue advantage over the other as also the hardship that may be caused to the defendant by directing specific performance. There may be other circumstances on which parties may not have any control. The totality of the circumstances is required to be seen."

9. The learned counsel for the respondent pointed out that the finding of the trial court that the defendant having raised a contention which was ultimately found to be incorrect should deprive her of her right to claim discretionary relief, is not correct in view of the Division Bench decision in **Aliyas T.V. and another** v. **A.Aboobacker** (ILR 2006(3) Kerala 447), wherein it was held thus:

> "11. As stated above, conduct of the defendant cannot be said to be totally out of place. The mandate in Section 20(1) that the discretion is not arbitrary but

sound and reasonable, guided by judicial principles, would take in the principles of justice, equity and good conscience as well. It is trite that a person who seeks equity shall do equity. Here again, we are of the view, that the judicial principles are to be invoked to find whether the discretion is to be exercised to decree or not to decree specific performance. Equitable considerations are quite relevant in the realm of exercise of discretion. But the question is whether the unsustainable nature of the defence made by the defendant would be a ground for exercising discretion in favour of the plaintiff, on the ground that the defendant is precluded by his conduct from contending that discretion should not be exercised in favour of the plaintiff. A defendant may fail to prove his defence. He may not able to bring before court the relevant evidence or proper witnesses. Sometimes, the defence may be false. In some cases, though the defence is true, the defendant may fail to prove it. In yet another case, the court may err in its finding that the defence is false or unsustainable. In our view, it cannot be said as a universal rule, that the defendant would be precluded from contending that discretion should be exercised not to decree specific performance or in other words discretion should not be exercised to decree specific performance, only because his defence is either unsustainable or not proved or false or because the court found it to be so. We are also of the view that in such

> a case, the plaintiff could not say that the discretion should be exercised in his favour to decree specific performance only because of such a defence or such a finding of court. The court has to consider all the facts and circumstances of the case in order to exercise the discretion to decree or not to decree specific performance and in that process could take into account equitable considerations as well."

10. On the basis of the principles mentioned above, it cannot be said that the discretion exercised by the Lower Appellate Court not to decree specific performance is illegal or unsustainable. The Appellate Court has considered all the relevant facts and circumstances of the case and had undertaken a balancing process of considering equities and held that the plaintiff is not entitled to the discretionary relief of specific performance. There is no illegality or impropriety in the view taken by the court below warranting interference in this appeal. I am of the view that no substantial question of law arises

for consideration. As held by the Supreme Court in **Narayanan** v. **Kumaran** ((2004) 4 SCC 26), an appeal against an order of remand would be entertained only on substantial questions of law. In that decision the Supreme Court held that in an appeal under Order XLIII Rule 1(u) the appellant is not entitled to agitate questions of facts and that the High Court should confine itself to such facts, conclusions and decisions which have a bearing on the order of remand and cannot canvass all the findings of facts arrived at by the Lower Appellate Court. It was also held that an appeal under Order XLIII Rule 1(u) should be heard only on the grounds enumerated in Section 100.

11. Learned counsel for the respondent contended that the opportunity given to the plaintiff to amend the plaint incorporating a prayer for recovery of the amounts covered by Exts.A4 and A5 is not legal and proper, since those

payments are not under the agreement for sale or any other agreement between the parties. He submitted that it is outside the scope of the suit. I am not inclined to accept this contention since the respondent has not challenged the order of remand nor has he filed any Memorandum of Cross Objection. It is not disputed that the plaintiff paid the amount covered by Exts.A4 and A5. It is also not disputed that those amounts were paid to avert sale of the plaint schedule property. Had he not paid those amounts, he would not be able to enjoy the fruits of the decree that he expected would be passed in his favour, if the plaint schedule property was sold for realisation of the debt due to the banks. Under those circumstances, the palintiff had to pay amounts as evidenced by Exts.A4 and A5. The defendant is benefited by such payment and it is unfair for the defendant to raise a contention that the plaintiff cannot be permitted to ask for return of that amount. This objection

raised by the respondent is without merit and it is rejected.

For the aforesaid reasons, there is no ground for interference and the Appeal is accordingly dismissed, however, without any order as to costs.

(K.T.SANKARAN)
Judge

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K.T.SANKARAN, J.

F.A.O.NO. 87 OF 2004

O R D E R

15th December, 2006